

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PEOPLE OF THE STATE OF NEW YORK

Ind. No. 1CR295-02

-against-

RAFAEL PEREZ

Defendant

**NOTICE OF
MOTION**

MOTION BY:

Amelio P. Marino, Esq.
Attorneys for Defendant
Rafael Perez

DATE, TIME
AND PLACE OF HEARING:

Motion is being submitted
without a date to the
Honorable Judge Yvette Kane

RELIEF REQUESTED:

An Order re-sentencing the
defendant and/or an Order
reducing the sentence.

SUPPORTING PAPERS:

Affirmation of
Amelio P. Marino, Esq.
dated 3/2/08 and all prior
Proceeding and pleadings
had herein

OPPOSING PAPERS:

If any to be submitted in
conformity with the IAS Rules of
Justice presiding judge.

Dated: New York, New York
March 3, 2008

Yours etc.

MARINO & VENEZIANO, ESQS

By Amelio P. Marino

Attorneys for Defendant

RAFAEL PEREZ

Office and P.O. Address

163 West 71st Street

New York, New York 10023

(212) 873-7297

To: Assistant U.S. Attorney
Christy Fawcett
P.O. Box 11754
Room 218
Federal Building
Harrisberg, Pa. 17108

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

Vs.

Ind. 1:CR01-295-02
Judge Kane

RAFAEL PEREZ

**AFFIRMATION IN SUPPORT OF
APPEAL TO REDUCE
DEFENDANT'S SENTENCE**

I hereby affirm under penalties of perjury to the following:

1. I am an attorney duly admitted to practice law in the Federal District Court of Southern and Eastern District of New York.
2. I represent the Defendant in this Motion to re-sentence this defendant or to reduce the defendant's present sentence pursuant to recent changes in sentences.
3. It is my understanding that under the previous Federal laws, defendant convicted of selling 5 grams of crack face the same five year mandatory sentence as offenders caught selling 500 grams of the powdered cocaine. This 100 to 1 rule is a legacy of the 1980's, when it was erroneously believed that crack was much more dangerous than the chemically identical powder. Congress made crack cocaine the only drug that carries a mandatory minimum sentence for possession even for first time offences. The sentencing commission sets guidelines for federal prison sentences.

The sentencing commission adopted new guidelines aimed at giving crack cocaine offenders a shot at marginally reducing offenders time in prison.

Under the new guidelines, each application/motion/petition for early release is to be evaluated by a federal judge in consultation with the authorities. Not all crack offenders are eligible and judges are specifically directed to weigh public safety concerns. Nothing prevents judges from releasing inmates to a halfway facility, where appropriate, to ease the transition back to society and reduce the chances of recidivism. All offenders would still have to serve their mandatory minimum sentence.

The commission issued its plan but the Supreme Court upheld the discretion of judges to dispense lighter sentences for crack cocaine offenders than those recommended by the federal sentencing guidelines.

4. Based upon my understanding of the above and my understanding of the law as outlined above, I am making this application. The idea of these 2 cases is the test that Federal judges impose sentences sufficient, but not greater than necessary to accomplish the sentencing goals set by congress. In one case there was an extensive discussion over the disparity between crack cocaine sentences and powder cocaine sentences. The Court wrote that it would not be an abuse of discretion for a District Court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence greater than necessary. In addition the guidelines are no longer mandatory.

In the Gall case, the Supreme Court restored broad discretion to district judge by allowing them to impose the sentence they deem most appropriate after considering all of the sentencing factors set forth in 18USC sect. 3553(a). It held that while the guidelines should be "the starting point and the initial benchmark" of a reasonable sentence, the sentencing judge "may not presume that the guidelines range is reasonable". The majority concluded that an app probation sentence imposed by an "experience" district judge was both reasoned and reasonable. The majority also dramatically changed the rules governing appellate reviews of sentences below the guideline range, holding that Circuit Courts may not make a de novo determination about whether the variation from the guideline range was "reasonable", but instead must use a "deferential abuse-of-discretion standard" even when a trial judge sets a punishment below the guideline range.

In Kimbrough, the Supreme Court held that a district judge may consider the crack/powder disparity when sentencing crack cocaine offenders, and impose a below - guidelines sentence if it determines that a within-guidelines is "greater than necessary" to serve the objectives of sentencing set forth at 18U.S.C. sect. 3553 (a). The Court also rejected the Fourth Circuits rationale that a sentence outside the guidelines is "per se unreasonable" because it is based on a disagreement with the crack-powder disparity.

5. According to my understanding of this law this defendant is eligible for the new crack cocaine amendments by adding guideline amendment 706 to the list of provisions specified in U.S. s.g. sect 1B1.10 that are entitled to retroactive treatment which take affect on March 3, 2008. It is also our position that the defendant may be eligible to be re-sentenced since the mandatory guidelines are no longer constitutional.

We are urging this Court to consider this defendant eligibility a lower sentence. I have attached the defendant's probation repeat to indicate to this Court that this defendant would not pose a danger to public safety.

WHEREFORE, we are respectfully requesting that this application/appeal for a reduced sentence be granted in all respects.

Dated: New York, New York
February 18, 2008

Respectfully,

Amelio P. Marino

Marino & Veneziano
163 West 71 Street
New York, New York 10023
(212) 873-7297

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